IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BEDROCK COMPUTER TECHNOLOGIES LLC,	§ § §	
Plaintiff,	§ §	
	§	**CASE NO. 6:09-cv-269-LED**
v.	§ §	
	§	**Jury Trial Demanded**
SOFTLAYER TECHNOLOGIES, INC., et al.	§ §	
	§	
Defendants.	§	

BEDROCK'S MOTION TO CLARIFY THE AGREED PROTECTIVE ORDER

I.   INTRODUCTION

At the heart of this lawsuit is the source code that runs on the computers of various Defendants, including Google. To facilitate the discovery of source code in a secure manner, the parties spent months drafting and negotiating the Agreed Protective Order, which the Court issued on February 1, 2010. Bedrock has since conducted its first visit to Google's facilities to access the Source Code Computers, but already Google has raised objections regarding (1) the number of source code printouts from the Source Code Computers and (2) the number of persons permitted to review source code printouts. These objections are not supported by any reasonable reading of the Agreed Protective Order. Bedrock has diligently engaged Google in discussions to resolve the objections, because having access to source code to the full extent allowed under the Agreed Protective Order is vital to resolving the issues in this case. Allowing Google to continue asserting its objections will severely prejudice Bedrock's ability to investigate, prepare, and try its case. For these reasons, the Court should grant this motion and clarify that the Agreed Protective Order permits Bedrock (1) to obtain more than one printout of source code from the Source Code Computers and (2) to disclose source code to more than two qualified persons.

II.   ARGUMENT

A.   Google's Restriction on Bedrock's Printing of the Source Code Violates the Agreed Protective Order.

Google has restricted Bedrock's access to source code by impermissibly limiting the number of source code printouts, thus imposing an undue burden on Bedrock and its expert consultants. The Agreed Protective Order provides that the "Source Code Computers shall be equipped with a printer to print copies of the source code on yellow, pre-Bates numbered paper, which shall be provided by the producing party." (Dkt. No. 170 ¶ 8(B)(xi).) Bedrock proposed this language, and over Google's objection the Court ordered its adoption into the Agreed

Protective Order. (Dkt. No. 166 ¶ 7.) Nowhere in the Agreed Protective Order—and nowhere in any other Court order or rule—is the number of source code printouts restricted. In fact, the plain language of the Agreed Protective Order actually provides for the ability to print multiple "copie_s_."[1] (Dkt. No. 170 ¶ 8(B)(xi) (emphasis added).) Under no reasonable interpretation of this language can one conclude that Google has a right to stop Bedrock from obtaining more than one printout of source code.

Notwithstanding the unambiguous language of the Agreed Protective Order, Google blocked Bedrock's consulting expert from printing more than one copy of the source code. (Ex. A.1 at 1.)[2] Before the arrival of Bedrock's expert at the site of the Source Code Computers, Bedrock sent a request to modify the Protective Order to allow its experts to make photocopies of the printed source code so that its other experts could have source code bearing uniform Bates ranges rather than separate printouts bearing different Bates ranges. Google not only did not respond to this request, Google further unilaterally prevented Bedrock's expert from printing more than one copy of the source code. (_Id._) Google's justification is that the Agreed Protective Order does not permit Bedrock's experts from printing more than one copy of each source code file. Under the Agreed Protective Order, however, Google does not have the right to limit the number of source code printouts. Further, Google's strained reading of the Agreed Protective Order leads to one of two absurd consequences: either (i) Bedrock's experts, who are spread across three states, must somehow share a single printout of Google's source code; or (ii) each

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[1] Even had the Court adopted Google's proposed language instead of Bedrock's, the number of printouts would still not have been restricted. Google's proposed language also allowed for multiple "copie_s_" to be printed. (Dkt. No. 165-2 at 9 n.2 (emphasis added).)

[2] References herein to "Ex. A._" are to the numbered exhibits accompanying the Declaration of Jonathan R. Yim, Exhibit A hereto.

expert must travel to Google's Source Code Computer facilities solely to print his own copy of the source code (rather than allowing a single expert print copies for the other experts).

Permitting Google to continue its unilateral, improper restriction on source code printouts will cause Bedrock to incur unnecessary expense and waste time, and this prejudice to Bedrock demonstrates why "one party may not unilaterally decide when to withhold discovery." *Garmin Ltd. v. Tomtom, Inc.*, No. 2:06-CV-338 (LED), 2007 WL 2903843, at *8 (E.D. Tex. Oct. 3, 2007). Bedrock, therefore, respectfully asks the Court to clarify that Google cannot limit the number of printouts that Bedrock prints of Google's source code.

B. Google's Restriction on the Number of Bedrock's Experts Violates the Agreed Protective Order.

Google has also restricted Bedrock's access to source code by impermissibly limiting the number of qualified experts who can review source code, thus imposing further undue burden on Bedrock and its experts. Again, nothing in the Agreed Protective Order mandates any such numerical limit. On the contrary, the Agreed Protective Order leaves open the number of experts who can review source code (documents designated "HIGHLY CONFIDENTIAL – SOURCE CODE"). Paragraph 7.2 specifically limits the disclosure of source code to "categories of individuals listed in Paragraphs 7.1(A) through (D), (F) and (G), subject to the restrictions therein." (Dkt. No. 170 ¶ 7.2.) In turn, paragraph 7.1(D)'s category comprises "[t]echnical advisors, consultants, and testifying experts." (*Id.* ¶ 7.1(D).) Notwithstanding this plain, unambiguous language allowing for the disclosure of source code to any number of qualified experts, Google has objected that Bedrock may not disclose source code to more than two experts. (Ex. A.2 at 1.)

In support of its objection, Google relies on portions of paragraph 8(B)(ix). (Ex. A.2 at 1.) However, this paragraph deals solely with access to the *physical* Source Code Computers,

which are the computers at Google's facilities equipped with source code (Dkt. No. 170 ¶ 8(B)(i)), but this limitation applies only to the Source Code Computers and not documents designated "HIGHLY CONFIDENTIAL – SOURCE CODE." Paragraph 8(B)(ix) reads:

> No more than two (2) individuals, per producing party, who qualify under paragraph 7.1D, above, for each receiving party, may have access to the Source Code Computers. *As an example to illustrate the foregoing sentence*, Plaintiff may have up to eighteen (18) individuals have access to the source code nine (9) Defendants, however no more than two (2) individuals may have access to any one Defendant's source code. . . .

(*Id.* ¶ 8(B)(ix) (emphasis added).) The limitation of individuals given in the example only applies to the Source Code Computers facilities and does not relate to the number of individuals who can review source code once printed out and designated "HIGHLY CONFIDENTIAL – SOURCE CODE," pursuant to paragraphs 7.1 and 7.2.

Google sought inclusion of this two-person limit to minimize the number of visitors to their facilities. (Ex. A.3 at 1.) Minimizing the number of visitors reduces the burden on Google of identifying, accompanying, and monitoring these visitors while they access the Source Code Computers. Although Bedrock accommodated Google by agreeing to send no more than two persons to access the Source Code Computers, Google now reads an extremely broad interpretation into this provision to severely restrict Bedrock's ability to investigate, prepare, and try its case. Bedrock has more than two experts who will need access to "HIGHLY CONFIDENTIAL – SOURCE CODE" documents in order to provide advice or trial testimony. In fact, the Discovery Order in this case allows Bedrock up to four testifying experts (Dkt. No. 173 ¶ 3), and there is no limit on the number of consulting experts. In a case where infringement and noninfringement will be focused on source code, limiting review of source code to just two Bedrock experts would be impracticable. It would also be unfair because there would be no

corresponding limit on the number of Google's experts or its employees who are allowed to review source code.

Google's overbroad reading of paragraph 8(B)(ix) not only lacks support from the plain language of the Agreed Protective Order, but its application would lead to a nonsensical result. Of the many categories of persons qualified to view source code pursuant to paragraphs 7.1 and 7.2,[3] only two individuals would be able to view Google's source code. Despite Google's contention that paragraph 8(B)(ix) applies only to experts (Ex. A.2 at 1-2) and not to other persons (Ex. A.4 at 1-2), no such distinction is in that paragraph or any other in the Agreed Protective Order. Google's reading of the paragraph 8(B)(ix) would exclude practically everyone otherwise qualified to view "HIGHLY CONFIDENTIAL – SOURCE CODE" documents. Bedrock therefore seeks the Court's clarification that the Agreed Protective Order does not make source code available to just two individuals.

III. CONCLUSION

For the foregoing reasons, Bedrock respectfully requests that the Court grant this motion and clarify that the Agreed Protective Order permits Bedrock (1) to obtain more than one printout of source code from the Source Code Computers and (2) to disclose source code to more than two qualified persons.

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[3] *E.g.*, counsel of record, employees of counsel of record, outside vendors, the Court, the Court's personnel, technical advisors, consultants, testifying experts, court reports, graphics operators, designers, animators, jury consultants, mock jurors, and other trial support staff.

DATED: May 20, 2010

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service on May 20, 2010. Local Rule CV-5(a)(3)(A).

/s/ Jonathan R. Yim
Jonathan R. Yim

CERTIFICATE OF CONFERENCE

The undersigned certify that the parties have complied with Local Rule CV-7(h)'s meet and confer requirement. On April 28, 2010, Douglas Cawley and Robert Christopher Bunt, lead and local counsel for Bedrock, conducted a personal conference by telephone with Claude Stern and Patrick Clutter, lead and local counsel for Google. Bedrock attorneys Austin Curry and Jonathan Yim and Google attorneys Todd Briggs and Andrew Bramhall also participated in this conference. The parties agreed to attempt to compromise on the number of source code printouts and experts. That attempt failed. On May 18, 2010, the parties again met and conferred regarding the number of source code printouts and experts. Douglas Cawley and Robert Parker, lead and local counsel for Bedrock, conducted a personal conference by telephone with Claude Stern and Michael Jones, lead and local counsel for Google. Bedrock attorneys Austin Curry and Jonathan Yim and Google attorneys Todd Briggs, Evette Pennypacker, and Jesse Geraci also participated in this conference. The parties could not come to an agreement because of the parties' different interpretations of the Agreed Protective Order. The discussions ended conclusively in an impasse, leaving an open issue for the Court to resolve. Google opposes this motion.

/s/ Douglas A. Cawley
Douglas A. Cawley, Lead Trial Counsel

/s/ Robert M. Parker
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